

## APPELLATE CIVIL.

1910  
August 2.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*  
DAKHNI DIN AND OTHERS (PLAINTIFFS) v. SYED ALI ASGHAR AND OTHERS  
(DEPENDANTS).\*

*Civil Procedure Code (1908), section 11—Res judicata—Same issue decided  
in two connected suits—Appeal in one only.*

The same issue was decided between the same parties in each of two connected suits. The party against whom the decision was appealed in the one case, but not in the other, the decree in which became final before his appeal was heard. *Held* that the hearing of the appeal was barred. *Zaharia v. Debia* (1) followed.

THE facts of this case are fully stated in the judgement of the Court.

The Hon'ble Pandit *Moti Lal Nehru*, for the appellants.

Mr. *M. L. Agarwala*, (with him *Babu Jagindro Nath Chaudhri*, The Hon'ble Pandit *Sundar Lal*, Dr. *Satish Chandra Banerji*, *Babu Lalit Mohan Banerji* and *Maulvi Shaft-uz-zaman*), for the respondents.

STANLEY, C. J., and BANERJI, J.—An objection has been taken on behalf of the respondents to the hearing of this appeal on the ground that the question raised in the appeal has become *res judicata* in consequence of the plaintiffs not having appealed against the judgement and decree in another suit in which the same issue was determined between these parties adversely to the appellants. The *res judicata* is alleged to have arisen out of the following facts: One *Rahat Husin* mortgaged certain property to *Gaya Prasad*, father of *Bhawani Prasad* and *Raja Ram*, defendants, on the 4th of January, 1883. On the 13th of February, 1890, he mortgaged the same property to *Bhawani Prasad*, *Raja Ram* and *Birj Mohan*, the sons of *Gaya Prasad*. On the 12th of September, 1891, he executed a mortgage in favour of *Musammatt Nidhoo Kunwar*. The suit out of which this appeal has arisen was brought by the plaintiff to enforce 9 subsequent mortgages, some of which were in favour of the plaintiff *Dakhoi Din* and some in favour of his deceased brother. This suit was No. 13 of 1906 in the court below. Another suit

\* First Appeal No. 118 of 1909 from a decree of *Prag Das*, Judge, Small Cause Court, exercising the powers of a Subordinate Judge of Allahabad, dated the 19th of January, 1909.

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which was No. 12 was brought by the plaintiffs against Hijab-un-nissa, the daughter-in-law of Rahat Husain and transferees from her, and also against Bhawani Prasad and Raja Ram to enforce three other mortgages in which property, other than the property comprised in the 9 mortgages referred to above, was mortgaged. These mortgages, as well as the mortgages on the basis of which suit No. 13 of 1906 was instituted, related to property which was also comprised in the three earlier mortgages. It appears that in 1905 the heirs of Rahat Husain sold some of the mortgaged property to Nidhoo Kunwar and set off against the consideration for the sale the amount of her mortgage and left with her a portion of the consideration for discharge of the mortgages of the 4th of January, 1883 and the 13th of February, 1890. She at first attempted to redeem those mortgages by payment of a proportionate part of the mortgage money, but the mortgagees having refused to allow redemption on those terms she redeemed the mortgages out of the proceeds of a sale executed by her in favour of Bhawani Prasad, defendant, and his brother Raja Ram. Raja Ram, however, repudiated the sale and he asserted that so far as his interests in the mortgages were concerned, the said mortgages were not discharged. The plaintiffs allege that they have paid to Nidhoo Kunwar the rateable share of liability of the property comprised in their mortgages, and they seek to sell the mortgaged property, not only for the amount secured by the mortgages in their favour but also for the amount which they paid to Nidhoo Kunwar. Raja Ram, who was made a defendant to the suit, resisted it on the ground that the earlier mortgages of 1883 and 1890 were not discharged so far as his interests were concerned, inasmuch as payment to Bhawani Prasad of the full amount of the mortgages was not a payment which would have the effect of discharging the share of the mortgage debt due to him. This contention was raised in both the suits to which we have referred. The court below tried both the suits and disposed of the first suit in which the issue as to the discharge of the earlier mortgages was raised. It recorded its decision on that issue in suit No. 13, and came to the conclusion that the amount payable to Raja Ram under the mortgages of 1883 and 1890 had not been satisfied, and it made a decree on condition that the plaintiffs should pay

the said amount to Raja Ram. In the other suit No. 12 it did not record a separate finding on the issue above mentioned, but it referred to its finding on the said issue in suit No. 13 and held in suit No. 12 also that Raja Ram's share in the mortgages of 1883 and 1890 had not been paid off. The plaintiffs have appealed against the decree in suit No. 13, but not in suit No. 12, and the time for preferring an appeal has expired, so that the judgement and decree in suit No. 12 have become final. It is contended that as the issue which arises in this appeal also arose in suit No. 12 between the plaintiffs and Raja Ram and was decided adversely to the plaintiffs, and as the judgement and decree in that case have become final between those parties, the question cannot be re-opened in this appeal. In our judgement this contention is well founded. The matter in issue between the parties was substantially determined in suit No. 12, although the reasons for the court's determination were given in the judgement in suit No. 13. In view of what the court had held in suit No. 13, it was not necessary to reiterate in the judgement in suit No. 12 the same reasons which were set forth in the judgement in suit No. 13; but the finding in both the suits on the issue was the same. That being so, since no appeal was preferred against the finding and decree in suit No. 12, the matter raised by the issue has become *res judicata* and cannot be raised again in this appeal. This was so held in the case of *Zaharia v. Debia* decided by a Bench of three Judges on the 9th of July, 1910, which is yet unreported.\* We accordingly allow the objection and dismiss the appeal with costs. We extend the time for payment of the various amounts directed by the decree to be paid, including the amount payable to Raja Ram, for a period of six months from this date.

*Appeal dismissed.*

\* Since reported, *Supra* p. 51.

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